IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 3293 OF 2005

Rajendra Devendra Desai ...Petitioner
V/s.
Surendra Devendra Desai & Anr. ...Respondents

Shri V.B. Rajure for the Petitioner.
Shri Manohar Limaye for Respondent No.1.

CORAM : V.M. KANADE, J.

DATED : MARCH 7, 2007

P.C. :-

1. Heard the learned Counsel for the petitioner and the learned Counsel for the respondent no.1.

2. The petitioner takes exception to the order passed by the 3rd Additional District Judge, Kolhapur, whereby the application preferred by the appellant to impound the document dated 5th August, 1998 has been rejected. The petitioner had raised an objection that the said document in Exhibit 76 was a partition deed and it is on a stamp paper of Rs.20/- and as such sufficient stamp duty has not been paid and therefore, under the provisions of the Stamp Act, the document ought to have been impounded. The lower Court observed that the

petitioner had not raised this objection when the document was exhibited and therefore, it was not open for him to raise this objection subsequently. The lower court relied on the decision in the case of **Nathi V/s. Ghansi (AIR 1987 Panjab and Haryana Page 105)** and also on the decision in the case of **Javershand V/s. Pukhraj Surana reported in AIR 1961 SC 1655.**

3. The learned Counsel for the petitioner submitted that the lower court had clearly committed an error of law which is apparent on the face of record since a specific objection was in fact raised by the petitioner. The objection is raised and it was recorded by the court is as under :-

> "Subject to legal provision as subject matter is more than Rs.100/-."

4. It is submitted that therefore, the order of the lower court is liable to be set aside as a ratio of the two judgments on which reliance is placed by the court is not applicable to the facts of the present case.

5. The learned Counsel for the respondents, on the other hand, vehemently opposed the submission made by the learned Counsel for the petitioner. He submits that a specific objection has not been raised and therefore, it was not open for the petitioner to invoke the provision of Section 36 of the Stamp Act. He submitted that the ratio of the two judgments on which reliance is placed, was squarely applicable to the facts of the present case. He also submitted that this is not a fit case where this court should interfere with the order passed by the lower court while exercising writ jurisdiction under Article 227 of the Constitution of India. He further submitted that in any case, document was a memorandum of partition and it was specific case of the respondents that there was oral partition and that oral partition was recorded in the memorandum of partition and that it was an admitted position that no stamp duty could be levied on a memorandum of partition.

6. After having considered the rival submissions made by the learned Counsel for the petitioner and the

learned Counsel for the respondents, I am of the view that the lower court was not justified in observing that no objection was raised by the petitioner. It is possible that lower court while recording the objection did not elaborately mention that objection but if the objection which is recorded is read in the proper context, it can be seen that objection was regarding the stamp duty which was payable since there is a reference in the objection that the subject matter exceeds the sum of Rs.100/-. Therefore, reliance on the two judgments by the lower court was not justified and they are not applicable to the facts of the present case. The trial Court on number of occasions exhibits documents subject to the objection raised by the other side and therefore, merely because of the document is exhibited, it cannot be said ipso facto that subsequently, the admissibility of the document cannot be challenged, particularly when the document is exhibited subject to the objection raised. This is often done by the trial court in order to save time and to ensure that the evidence of the witness is recorded without any interruption. The submission of the learned Counsel for the respondents

that once the document is exhibited, objection regarding the admissibility of the document, therefore, cannot be taken at a subsequent stage, cannot be accepted particularly when the document is exhibited subject to the objection which is raised by the petitioner.

7. In my view, therefore, the order passed by the trial court on the said application will have to be set aside and the lower court is directed to consider the objection at the time of the final arguments. If the trial court comes to the conclusion that the submission made by the defendant is correct, then the question of payment of stamp duty would not arise. If however it is held that this is a partition deed, then the question of payment of stamp duty would then arise and the court may pass appropriate orders in accordance with law.

8. With these observations, writ petition is allowed. The trial Court is directed to decide the suit, as expeditiously as possible and in any case within a period of one year.

(V.M. Kanade, J.)